NATSAFE ENGINEERING SDN BHD

v.

CIMB BANK BERHAD

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[CIVIL SUIT NO: 22 NCVC-904-07-2012]
25 SEPTEMBER 2013

BANKING: *Banker and customer - Forgery - Dishonoured cheques - Three authorised signatories to account - One signatory alleged to be fraudster - Bank debited sum despite detecting signatory's signature different from specimen signature - Whether payment of cheques by bank null and void - Whether plaintiff had right to institute proceedings against bank - Whether forgery proven - Whether bank liable to plaintiff for honouring payment of cheques - Whether bank acted in good faith - Bills of Exchange Act 1949, ss. 24, 73A, 95*

The plaintiff had opened an account with the defendant bank and there were three authorised signatories to the account, namely, Loi Teak Ping ('PW3'), Loi Tek Huat and Loi Teak Kwong. PW3 was the only non-bankrupt director of the plaintiff while the other director, Loi Tek Huat, was a bankrupt. The plaintiff's case was that the signature of one of its directors, PW3 had been forged on three cheques ('the cheques') and by honouring these cheques, the defendant had debited RM738,000 ('the said sum') between 29 February 2008 and 3 March 2008. Therefore, it was the plaintiff's contention that the payment by the defendant on the three cheques was a nullity. Evidence showed that when the defendant detected that PW3's signature on the cheques was different from the specimen signature, the former contacted Loi Teck Huat, the alleged fraudster, for confirmation whether the purported signature actually belonged to PW3. In opposing the claim, the defendant submitted that at the time when the suit was instituted, the plaintiff was in breach of s. 122(1) of the Companies Act 1965 which requires that every company should have at least two directors. Further, the defendant argued under s. 95 of the Bills of Exchange Act 1949 ('BEA'), even if it was negligent, it was not liable under s. 73A of the same Act since it had acted in good faith. In the present claim, the plaintiff sought a declaration that the defendant had wrongfully debited the sum from the plaintiff's account. The issues that arose for the court's

A determination were (i) whether the plaintiff had the right to institute proceedings against the defendant; (ii) whether forgery had been proven; and (iii) whether the defendant was liable to the plaintiff for honouring payment of the cheques.

B **Held (allowing claim with costs):**

(1) The plaintiff's company's commission search on the plaintiff showed that one Ng Bee was appointed a director by the plaintiff. Hence, it was clear that PW3 was not the sole director of the plaintiff. Since there was proper ratification and/
C authorisation from the plaintiff for PW3 and Ng Bee to commence legal proceedings and maintain the suit on its behalf, the suit ought to be instituted and maintained. (paras 12 & 15)

D **(2)** Nowhere did the defendant plead the issue that the suit ought to be dismissed in view of PW3's lack of authority to institute and maintain the suit as the sole director of the plaintiff. It is trite law that a party is bound by its pleadings. In the absence of any specific plea, the defendant could not be
E allowed to raise a new issue against the plaintiff. The plaintiff was a separate legal entity and had the right to institute and to maintain the suit in the absence of any proceedings filed by the defendant to challenge and declare null and void the institution of such suit by the plaintiff. (para 16)

F **(3)** It was highly probable that PW3's signatures in the cheques were forged. Through the defendant's automated signature verification, the defendant compared the signature in the cheque image which was received from the bank where the
G cheque was deposited with the specimen signature of the signatory in the defendant's system. When it was found that there was some difference in the signatures, the ASV would reject the cheque image for manual verification by examining the signature in the cheque with the specimen signature.
H Through their usual practice of manual verification of the cheques, the defendant did have suspicion over the signatures in the cheques. (paras 23, 25 & 26)

(4) "Good faith" in s. 95 of the BEA could not extend to the
I defendant's acts which fall short of the highest standard required of a bank in its discharge of its duties to its

customers. If PW3's signature in the cheques was doubted and the defendant's officers were already suspicious about it, the defendant was under a legal duty to the plaintiff to telephone or contact, in any other way possible, not only PW3 but also the plaintiff. Instead, the defendant's officers called Loi Teck Huat whose name did not even appear in the cheques. Hence, the defendant could not be allowed to avail itself of the defence in s. 73A of the BEA. The defendant should be made liable for this mistake, for contacting the wrong person to confirm payment and then allowing the fraudulent withdrawal of RM738,000 from the plaintiff's account based on instruments which were probably forged. (para 53)

Case(s) referred to:

Alexander Ward & Co Ltd & Anor v. Samyang Navigation Co Ltd [1975] 1 WLR 673 ***(refd)***

Danish Mercantile Co Ltd & Ors v. Beaumont & Anor [1951] Ch 680 ***(refd)***

ML Breadworks Sdn Bhd v. Malayan Banking Bhd [2013] 1 CLJ 833 HC ***(refd)***

Presentaciones Musicales SA v. Secunda & Anor [1994] Ch 271 ***(refd)***

United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***

Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors [1997] 2 CLJ 467 HC ***(refd)***

Legislation referred to:

Bills of Exchange Act 1949, ss. 24, 73A, 95

Companies Act 1965, s. 122(1)

For the plaintiff - Premshangar Venugopal (Muralidharan Balan Pillai with him); M/s Lewis & Co

For the defendants - Arham Rahimy Hariri (HL Chan with him); M/s Azim Tunku Farik & Wong

Reported by Najib Tamby

JUDGMENT

Yeoh Wee Siam J:

Enclosures 6 and 5

[1] *Vide* the amended writ of summons (encl. 6) and the amended statement of claim (encl. 5), the plaintiff is seeking a declaration that the defendant had wrongfully debited the sum of

A RM738,000 from the plaintiff's current account no. 1442-0001473-05 ("the account'). The plaintiff prays for judgment against the defendant for the said sum together with interest and costs.

B **Brief Facts**

[2] The plaintiff is a customer of the defendant bank (or "the bank") located at No. 76 dan 78, Jalan Cerdas, Taman Connaught Cheras, 56000 Kuala Lumpur operating the account.

C **[3]** The authorised signatories to the account were:

(i) Loi Teak Ping (PW3), director and shareholder;

(ii) Loi Tek Huat, director and shareholder;

D (iii) Loi Teak Kwong, shareholder.

(See CBOD Part B p. 18).

[4] By way of honouring the following three cheques ("the three cheques"), the defendant had, between 29 February 2008 and 3 March 2008, debited the sum of RM738,000 from the account on 29 February 2008:

E

Cheque No.	Dated	Amount (RM)
F 249854	29.2.2008	650,000.00
249851	29.2.2008	75,000.00
249852	29.2.2008	13,000.00
G **Total**		**738,000.00.**

[5] The plaintiff's managing director, Loi Teak Ping, had lodged a police report on 13 March 2008 at the Cheras Police Station *vide* Report No. CHERAS/005100/08 with respect to the forgery of his signature on the three cheques and the unauthorised payments by the bank.

H

Whether The Plaintiff Has The Right To Institute These Proceedings

I **[6]** Counsel for the defendant submitted that PW3, in his cross-examination, had admitted that he is the only non-bankrupt director of the plaintiff since March 2011. Another director of the

plaintiff, Loi Tek Huat, has been a bankrupt since 31 March 2011, (CBOD p. 39). He cited art. 79 of the plaintiff's Articles of Association ("AA") which states that the office of a director shall be vacated if he becomes a bankrupt.

[7] Section 122(1) of the Companies Act 1965 requires that every company shall have at least two directors.

[8] Article 77 of the AA provides that unless and until otherwise determined by the company in a general meeting, the director of the plaintiff company shall not be less than and not more than seven.

[9] Article 105A of the AA provides:

> The continuing Directors may act at any time notwithstanding any vacancy on their body, provided always that *in case the Directors shall at anytime be reduced in number to less than two it shall be lawful for them to act as Directors for the purpose of filling up vacancies in their body or of summoning a General Meeting of the Company,* **but not for any other purposes.** (emphasis added).

[10] Counsel for defendant then submitted that at the time when this suit was instituted on 30 August 2012, the plaintiff was in breach of s. 122(1) of the Companies Act 1965 and the plaintiff's above AA. PW3 was the sole director at the material time and has no authority to bring this action in the name and on behalf of the plaintiff against the defendant.

[11] After PW3's cross-examination on 26 June 2013, the plaintiff, on the next date for continued hearing ie, 12 July 2013, attempted to regularise PW3's lack of authority to file and maintain this suit by recalling PW3 after the closure of the defendant's case. PW3 produced exh. P2 which appears to be a director's resolution dated 2 July 2013 to ratify and validate PW3's previous conduct in filing the suit without proper authorisation.

[12] Exhibit P2 was signed by PW3 and one Lee Ng Bee. The defendant's companies commission search on the plaintiff (CBOD part B p. 35) shows that Lee Ng Bee is not a director of the plaintiff. However, in the additional CBOD at p. 6, the plaintiff's companies commission search shows that one Ng Bee, and not Lee Ng Bee, was appointed a director of the plaintiff on 2 July 2013. From the additional CBOD p. 6, it is clear that PW3 is not the sole director of the plaintiff. The court holds that the plaintiff's

resolution (exh. P2) is valid as it was signed by two directors of the plaintiff ie, PW3 and Ng Bee on 2 July 2013, before this suit was instituted.

[13] Where an objection is taken that an action had been commenced without proper authority, the plaintiff can ratify the same by the passing of a resolution.

[14] In *Danish Mercantile Co Ltd & Ors v. Beaumont & Anor* [1951] Ch 680 it was held:

> Where proceedings are started in the name of a plaintiff without proper authority, so long as the matter rests there, the action is not properly constituted ... . It is, however, open at any time to the purported plaintiff to ratify the act of the solicitor who started the action, and to adopt the proceedings. When that has been done, then, in accordance with the ordinary law of principal and agent, and in accordance with the ordinary doctrine of ratification, the defect in the proceedings as originally constituted is cured, and it is no longer open to the defendant to object that the proceedings then ratified and adopted were in the first instance brought without proper authority.

(see also *Presentaciones Musicales SA v. Secunda & Anor* [1994] Ch 271; *Alexander Ward & Co Ltd & Anor v. Samyang Navigation Co Ltd* [1975] 1 WLR 673; and *Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors* [1997] 2 CLJ 467).

[15] Since there is proper ratification and/or authorisation from the plaintiff for PW3 and Ng Bee to commence legal proceedings and maintain this suit on its behalf, this suit ought to be allowed to be instituted and maintained.

[16] Further, upon a perusal of the defendant's defence, it is noted that nowhere did the defendant plead the issue that this suit ought to be dismissed in view of PW3's lack of authority to institute and maintain the suit as the sole director of the plaintiff. It is trite law that a party is bound by its pleadings. In the absence of any specific plea on this matter, the defendant cannot now be allowed to raise this new issue against the plaintiff. In any case, the court takes the view that the plaintiff is a separate legal entity and has the right to institute and maintain this suit in the absence of any proceedings filed by the defendant to challenge and declare null and void the institution of such suit by the plaintiff.

[17] The preliminary objection of the defendant is therefore dismissed, and the court allows the plaintiff's suit to be instituted and maintained.

Whether Forgery Has Been Proved

[18] The plaintiff's pleaded case is that the signature of one of its directors, Loi Teak Ping (PW3) on the impugned three cheques had been forged (see para. 5 of the statement of claim).

[19] There is no pleading regarding the alleged forgery of the signature of Loi Teak Kwong, even though counsel for the plaintiff addressed it in his submissions. As I have stated earlier, a party is bound by its pleadings. Therefore, it is not open to the plaintiff to surprise the defendant by bringing in the new allegation of forgery of Loi Teak Kwong's signature in the three cheques.

[20] C/Insp Sherman bin Salleh (Bahagian Siasatan Jenayah Komersial IPD Cheras, Kuala Lumpur) (PW1), the investigating officer ("IO"), testified that based on the Laporan Forensik Jabatan Polis, it was concluded that the three signatures of the plaintiff's director, Loi Teak Ping (PW3), had been forged on all the three cheques (see police letter dated 31 May 2012 to the plaintiff in CBOD part B p. 14).

[21] PW1 further informed the court that the police are taking steps to charge Loi Tek Huat for four criminal charges but so far they have been unable to do so because Loi Tek Huat had run away and could not be found.

[22] The court agrees with the submission of counsel for the defendant that forgery has not been proved. The Laporan Forensik has not been produced in court and the maker of such report did not come to this court to testify on the matter. PW1 is not a handwriting expert and not a document examiner. He is merely an IO depending on the Laporan Forensik. However, it is highly probable that the prosecution has a strong case against Loi Teck Huat for forgery of the signatures on the three cheques. Otherwise, as informed by PW1 to the court, PW1 and the police would not have blacklisted Loi Tek Huat and tried to trace him through the newspapers and Facebook.

[23] From the evidence of Adnan bin Md Noor 1 (DW3), the senior manager of the defendant's Spick-Centre KL, it is confirmed that through the defendant's automated signature

verification ("ASV"), the defendant went through the process of verification by comparing the signature in the cheque image (received from the bank where the cheque was deposited) with the specimen signature of the signatory in the defendant's system. When it was found that there was some difference in the signatures, the ASV would reject the cheque image for manual verification by examining the signature in the cheque with the specimen signature (CBOD part B pp. 18 to 20).

[24] From the defendant's notification form of cheque RTD-Spick KL-CIMB Bank (CBOD part B p. 9), the court notes that it is recorded therein that the SPICK-Centre had decided to return the cheque for RM650,000 for the reason that the "signature was not according to specimen" and "signature differ/not in database".

[25] DW3 further stated that through their usual practice of manual verification of the three cheques, the defendant did have a suspicion over the signatures in the cheques. That was why the defendant's officers had to call the plaintiff's director, Loi Tek Huat, for confirmation before payment of the three cheques.

[26] This is a civil suit arising from the alleged forgery of a signature, and it is not a criminal matter. The standard of proof applicable here is one based on a balance of probabilities, and not proof beyond reasonable doubt.

[27] Based on the above evidence, at this juncture, on a balance of probabilities, the court finds that it is highly probable that PW3's signatures in the three cheques were forged.

Whether The Defendant Is Liable

[28] The plaintiff contended that the payment by the defendant on the three cheques is a nullity since the cheques were forged instruments which the defendant had no authority, actual or implied, from the plaintiff to honour the three cheques.

[29] In *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31; [1993] 1 MLJ 182 the Supreme Court held, dismissing the appeal:

(1) *A customer who alleges that his banker has honoured forged cheques drawn on his account need only establish the charge on balance of probabilities.*

(2) *It is an established principle that liability of a bank for making payment on forged instruments of the customer is founded on the tort of conversion, which is a tort of strict liability.* Therefore, at common law, a banker who pays out on such forged instrument is absolutely liable to make good the loss. It is no answer for him to say that he was unaware of the forgery or that he took reasonable care. The forged instrument is a nullity and the banker has no authority, actual or implied, from his customer to act on it.

(3) *At common law a customer owes his banker only two duties. The first is to refrain from drawing a cheque in a manner as may facilitate fraud or forgery. The second is a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as the customer becomes aware of it.* However, there does not exist at common law a further duty on the part of the customer to take precaution in the general course of his business to prevent forgeries on the part of his servants. Neither is there at common law, in the absence of a contract to the contrary, a duty imposed upon the customer to inspect his periodical statements to ensure that his account is being properly maintained by the Bank. (emphasis added)

[30] In *ML Breadworks Sdn Bhd v. Malayan Banking Bhd* [2013] 1 CLJ 833 Nallini Pathmanathan J. held:

It is incumbent upon a bank to compensate or reimburse its customer if it makes payment on forged instrument. *Prima facie*, upon proof of a cheque having been forged, the liability of the bank arises without question as an absolute liability ...

[31] As rightly submitted by counsel for the defendant, the common law position of strict liability being imposed on the bank in the case of making payment on a forged instrument has now been codified in s. 24 of the Bills of Exchange Act 1949 ("BEA") (see *United Asian Bank Bhd (supra)*).

[32] Counsel for the plaintiff submitted that in the present case:

(i) the plaintiff has discharged its burden of proof on a balance of probabilities that the three cheques had been forged;

(ii) the plaintiff had complied with its two duties:

(a) by refraining from drawing a cheque in a manner as may facilitate fraud or forgery; and

(b) by informing the bank of any forgery of a cheque purportedly drawn on the account as soon as it became aware of it.

Regarding (i) above

[33] In view of my earlier finding that it is highly probable that the signature of PW3 in the three cheques had been forged, I now hold that the plaintiff has discharged its burden of proof on a balance of probabilities.

Regarding (ii)(a) above

[34] Hoe Yee Then (PW2), the former administration clerk of the plaintiff, gave evidence that normally the plaintiff would keep its cheque books in the locked cupboard. When the boss wanted to issue the cheque, he would pass PW2 the key and PW2 would go to the cupboard to open it and take the cheque book and then pass it to the boss. This shows that the plaintiff had been cautious in keeping its cheque books ie, the plaintiff refrained from drawing a cheque in a manner that may facilitate fraud or forgery. The court further notes that the forgery of the three cheques were not from the cheque books which were in the safe possession of the plaintiff. Instead, the wrongful payment of monies arose from the new cheque book that the defendant had issued to Loi Tek Huat, whom the plaintiff alleged is the fraudster who had subsequently issued the three cheques from such new cheque book and forged the signature of the other director, Loi Teak Ping, and withdrew the monies.

Regarding (ii)(b) above

[35] The defendant contended that Loi Tek Huat had requested for a new cheque book by way of a letter dated 27 February 2008 (ID-D1 at CBOD p. 50). However, the original of the letter, which the defendant claimed had been given to the police, was not produced in court. Thus, the copy of that purported letter that was tendered in court remained as an ID, and was not marked as an exhibit. As such, the court could not give any weight to it.

[36] On the other hand, the plaintiff could prove that it had never authorised the request for the issuance of the new cheque book. PW3 himself confirmed that he had never signed ID-D1.

[37] From the evidence of Norlina bte Abu Kassim (DW4), the defendant's customer service officer, it is shown that at the end of Februari 2008, Loi Tek Huat had contacted DW4 and informed her that the plaintiff's slip for application of a new cheque book which is usually found in a cheque book had been misplaced. Loi Tek Huat asked DW4 how he could get a new cheque book. DW4 requested Loi Tek Huat to write an official letter to the defendant to apply for the new cheque book. DW4 did not receive the said official letter because it was not under her job scope.

[38] DW4 therefore was in no position to confirm whether the plaintiff's official letter requesting for the new cheque book is ID-D1. However, from the evidence of PW3 and DW4, it can be concluded that Loi Tek Huat, and not Loi Tek Ping, was the one who had applied for the new cheque book from which the three cheques had been issued. Mohamad Tarmizi bin Abdul Rahman (DW1), the defendant's customer service officer of the defendant's branch where the plaintiff maintained the account, confirmed that Loi Tek Huat collected the new Cheque Book Nos. 249851 to 249900 from the defendant on 29 February 2008 (CBOD part B p. 44).

[39] The plaintiff fulfilled its second duty to the defendant by immediately notifying the defendant of the forgery of the three cheques which were drawn on the plaintiff's account as soon as it become aware of it. The monies from the account were drawn out on 3 March 2008. Upon discovery, the plaintiff had written a letter dated 12 March 2008 to the defendant informing, *inter alia*, of the monies that were missing from the plaintiff's account, and the accounts of Natsafe (M) Sdn Bhd and Bumi Natasha Sdn Bhd, and instructed the defendant to stop payment on all cheques (CBOD part B p. 5). On 13 March 2008 the plaintiff lodged a police report on the matter (CBOD part B pp. 7 - 8). By a letter dated 17 March 2008, the plaintiff informed the defendant that the monies totalling RM738,000 had been withdrawn from its account as a result of forgery of the three cheques. The plaintiff also informed the defendant that it had never issued ID-D1 when it was shown to the plaintiff, nor did the plaintiff make any cheque payment business using the cheque book (CBOD part B p. 9).

[40] From the above documents, the court is satisfied that the plaintiff had notified the defendant immediately upon discovery of the forgery and hence had discharged its second duty as the defendant's customer.

[41] The question now is whether the defendant is liable to the plaintiff for honouring payment for the three cheques.

[42] The exception to the strict liability of the bank in s. 24 of the BEA is the defence provided in s. 73A of the BEA.

[43] The defendant relied on s. 73A of the BEA which provides:

> Knowingly or negligently facilitating forgery
>
> 73A. Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorized signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value.

[44] Section 73A of the BEA can only be invoked as a defence for the defendant if it can be shown that:

(i) the person whose signature it purports to be, ie, the plaintiff and/or Loi Teak Ping (PW3), had knowingly or negligently contributed to the forgery or the making of the unauthorised signature; and

(ii) the defendant had acted in good faith in honouring the three cheques.

Regarding (i) above

[45] There is no satisfactory evidence adduced by the defendant on the matter. It would be wrong to conclude that the plaintiff is responsible for the individual or personal fraudulent acts of its directors, and hence the plaintiff had knowingly or negligently contributed to the forgery of the three cheques by the alleged fraudster. It is clear from the evidence that Loi Teck Huat had acted without the knowledge of the other director, PW3, and the plaintiff.

[46] On the other hand, the plaintiff's evidence shows that the plaintiff had not been negligent. Instead, the plaintiff had been careful to keep its cheque books under lock and key in its cupboard. The three cheques were not from the cheque books that were kept in the plaintiff's cupboard, but were from the new

cheque book issued by the defendant and given to Loi Tek Huat, upon Loi Teck Huat's application. There is no proof that the plaintiff knew of or had negligently contributed to the forgery of PW3's signature.

Regarding (ii) above

[47] The term "good faith" in s. 73A of the BEA has been defined in s. 95 of the same Act as follows:

> A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not.

[48] The evidence shows that the defendant, even though it purported to have acted in good faith, had been negligent in honouring the three cheques. This is because when the defendant's Spick-Centre detected that the signature of PW3 on the cheques was different from the specimen signature, the defendant, should have contacted PW3 for confirmation regarding his signature. However, Khairul Nizam bin Mokhtar (DW2), the defendant's officer from its GIOD Support Branch, did not contact PW3 for Cheques Nos. 249854 and 249851 (for the two cheques which are above RM25,000). Similarly, for Cheque No. 249854, DW1 only contacted Loi Tek Huat for his confirmation for payment. Therefore, both DW1 and DW2 purportedly contacted Loi Tek Huat, the alleged fraudster, for confirmation whether the purported signature of PW3 belongs to PW3. This is a fatal mistake considering that only the relevant signatory of the three cheques, ie, PW3, can confirm whether in fact he did sign the three cheques. Even though Loi Tek Huat is one of the three authorised signatories of the plaintiff (CBOD part B p. 18), and at all times two signatories are required to issue any cheque of the plaintiff, the fact remains that Loi Tek Huat, who was not one of the two signatories to the cheques, was the wrong person for DW1 and DW2 to confirm with, that PW3 did sign the respective cheques, if indeed they did call Loi Tek Huat as alleged.

[49] The defendant contended that it did not receive exh. P1 ie, the plaintiff's letter to the defendant dated 27 February 2006 informing the defendant of the plaintiff's new address at Desa Sri Hartamas, Kuala Lumpur, and office telephone and fax numbers, and the contact persons being Loi Tek Huat, Loi Teak Ping and Loi Teak Kwong and their respective mobile telephone numbers.

[50] DW1 maintained that exh. P1 was not in the defendant's records and he had never seen it before. That was why he had to contact Loi Tek Huat at the latter's mobile phone number, which was the contact number of the plaintiff given to the defendant, and obtained Loi Teck Huat's confirmation that Cheque No. 249854 is valid and payment can be made by the defendant.

[51] Counsel for the defendant submitted that the defendant's officers, DW1 and DW2, only knew of Loi Teck Huat's mobile telephone number, and not the telephone numbers of the plaintiff and the other signatories of the plaintiff since the plaintiff had never sent exh. P1 to the defendant. However, upon scrutinising exh. P1, the court finds that there is a round stamp which, though not clear, appears to look like a stamp of receipt or acknowledgement of the defendant ie, CIMB at its Taman Connaught Branch in KL. It is more probable that the plaintiff had sent exh. P1 to the defendant, but DW1 and DW2 either have not seen it or only decided to telephone Loi Teck Huat for confirmation for payment for the three cheques. Exhibit P1 clearly shows that the plaintiff's office telephone number and the respective mobile telephone numbers of Loi Teak Huat, Loi Teak Ping and Loi Teak Kwong were given to the defendant. Even if the benefit of the doubt is given to the defendant that it did not receive exh. P1 from the plaintiff, the court notes that the plaintiff's "notification on change/amendment of particulars" in CBOD part B p. 42, which was relied upon by DW1 when he telephoned Loi Teck Huat for Cheque No. 249854, contains the plaintiff's telephone number, 03-2300 2889, which DW1, or even DW2 or the defendant could have contacted for confirmation for payment.

[52] Apart from the oral assertions by DW1 and DW2 that they did in fact call Loi Teck Huat to confirm payment on the three cheques respectively, there is no documentary evidence to prove that such alleged telephone calls were made by them.

[53] The defendant was certainly negligent in not making any effort to contact Loi Teak Ping (PW3), the correct person, to give confirmation on his signature for the three cheques to allow payment thereof. Counsel for the defendant submitted that under s. 95 of the BEA, the defendant, even if it is negligent, is not liable under s. 73A of the same Act, since it had acted in good

faith. This court is of the opinion that "good faith" in s. 95 of the BEA cannot extend to the defendant's acts which fall short of the highest standards required of a bank in its discharge of its duties to its customers. If Loi Teak Ping's signature in the three cheques is doubted, and the defendant's officers are already suspicious about it, the defendant is under a legal duty to the plaintiff to telephone or contact, in any other way possible, not only Loi Teak Ping, but also the plaintiff. Instead, the defendant's officers took the easy and wrong way out by calling Loi Teck Huat whose name did not even appear in the three cheques. For this, the defendant cannot be allowed to avail itself of the defence in s. 73A of the BEA. The defendant should be made liable for this mistake, for contacting the wrong person to confirm payment, and then allowing the fraudulent withdrawal of RM738,000 from the plaintiff's account based on instruments which are probably forged.

Decision

[54] Going by the above considerations, the plaintiff's claim in prayers 17.1, 17.2 and 17.3 of the amended statement of claim is allowed. Costs of RM15,000 are to be paid by the defendant to the plaintiff.